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# In the Supreme Court of the United States

OCTOBER TERM, 1971

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Nos. 71-327, -328, -346, -347

TEXAS GULF SULPHUR COMPANY, ET AL., PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION

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EARL L. HUNTINGTON, PETITIONER

*v.*

SECURITIES AND EXCHANGE COMMISSION

---

DAVID M. CRAWFORD, PETITIONER

*v.*

SECURITIES AND EXCHANGE COMMISSION

---

WALTER HOLYK, ET AL., PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 220a-233a) is reported at 446 F. 2d 1301. The opinion

of the district court (Pet. App. 175a–214a)[1] is reported at 312 F. 2d 77. The prior opinions of the court of appeals (Pet. App. 66a–171a) and the district court (Pet. App. 1a–63a) are reported respectively at 401 F. 2d 833 and 258 F. Supp. 262.

## JURISDICTION

The judgment of the court of appeals was entered on June 10, 1971 (Pet. App. 220a).[2] The petitions for writs of certiorari were filed on September 3, 1971, and September 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Because petitioners' notice of appeal to the court of appeals may have been a nullity (see n. 3 *infra*), there may be a question as to the jurisdiction of this Court.

## QUESTIONS PRESENTED

1. Whether Rule 10b–5 of the Securities and Exchange Commission, which proscribes activities operating as a fraud or deceit upon any person in connection with the purchase or sale of securities, validly outlaws

(a) the issuance without due care of a materially misleading corporate press release reasonably calculated to influence the investing public;

(b) trading by insiders in securities of their corporation on the basis of undisclosed material facts and

[1] "Pet. App." refers to petitioners' appendix in No. 71–327.

[2] The prior judgment of the court of appeals was entered on August 13, 1968. Petitioners filed a petition for rehearing on September 20, 1968, which was denied on October 7, 1968. Separate petitions for certiorari were filed by Harold B. Kline, who once again seeks review in No. 71–327, and by Francis G. Coates. Both petitions were denied. 394 U.S. 976.

the giving of tips for others to trade on the basis of such facts; and

(c) the acceptance by top corporate officials of stock options without disclosing to the corporate directors granting such options material nonpublic information affecting the market value of the corporation's stock.

2. Whether a press release issued by petitioner Texas Gulf Sulphur Company to deny newspaper stories respecting a rumored ore discovery by Texas Gulf was materially misleading and issued without due care.

3. Whether information respecting Texas Gulf's drilling into what proved to be a remarkably rich deposit of copper, zinc, and silver ore was material information that should have been disclosed when insiders of the company purchased its stock, gave tips or accepted stock options.

4. Whether the court of appeals properly held that the district court did not abuse its discretion in enjoining the commission of future similar violations by certain insiders of Texas Gulf who had purchased its stock "knowing beyond peradventure of a doubt that [Texas Gulf] had made a very important mineral discovery" that had not been disclosed.

5. Whether Section 27 of the Securities Exchange Act, granting the district court jurisdiction over violations of the Act and over all suits in equity to enforce any liability or duty created by the Act, authorized the district court, in an injunction action brought by the Commission, to direct that the profits resulting from violations of the Act be given up, both

by violators who are enjoined and by those who are not enjoined.

6. Whether a court of appeals can decide a case *en banc* when only a three-judge panel has heard oral argument and, if not, whether the precedure can be attacked by parties who failed to object when the court announced that it intended to follow such procedure.

## STATUTE AND RULE INVOLVED

Sections 10(b), 21(e) and 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78u(e) and 78aa, and Rule 10b–5 of the Commission, 17 CFR 240.10b–5, are set out at Pet. App. 235a–239a.

## STATEMENT

This action arises out of "a major strike of zinc, copper and silver * * *" (Pet. App. 40a) by Texas Gulf Sulphur Company ("Texas Gulf") on land located near Timmins, Ontario, Canada. The exploratory drilling that preceded a news release distributed at a press conference announcing this discovery on April 16, 1964, was carried out by Texas Gulf in the preceding five-month period (Pet. App. 1a). The courts below found that, prior to sufficient dissemination of this announcement to the public, ten officers, directors and employees of Texas Gulf, who possessed various degrees of information about the results of the drilling at various stages in the exploration, all engaged in securities transactions in violation of Section

10(b) of the Securities Exchange Act and the Commission's Rule 10b–5.

The court of appeals affirmed the judgment entered April 16, 1970, against six of the nine individual petitioners: Harold B. Kline, vice president and general counsel; David M. Crawford, secretary; Walter Holyk, chief geologist; Earl L. Huntington, attorney; Richard Clayton, engineer, and Kenneth H. Darke, geologist; no judgment was entered against petitioners Claude O. Stephens, president and director, Charles F. Fogarty, executive vice president and director, or Richard D. Mollison, vice president-exploration.[3] The court

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[3] One of the defendants, Francis G. Coates, a director of Texas Gulf, consented to entry of a judgment against him on October 2, 1969, pursuant to a stipulation with the Commission (R. 6412–6420).

On June 22, 1970, a default judgment was entered against another defendant, Thomas P. O'Neill, an accountant who had been employed by Texas Gulf. Petitioners' notice of appeal, which was filed on June 15, 1970, preceded the entry of the default judgment. Since there had not been, as Rule 54(b) of the Federal Rules of Civil Procedure specifies, an "express determination that there [was] no just reason for delay" and there had been no "express direction for the entry of judgment," the order petitioners appealed from, entered on April 16, 1970, appears not to have been a final judgment that is appealable. *Davis* v. *National Mortgage Corp.*, 320 F. 2d 90 (C.A. 2); *G.W.K., Inc.*, v. *Philco Corp.*, 276 F. 2d 928 (C.A. 2); *Partin* v. *Hassan Motors, Inc.*, 363 F. 2d 104 (C.A. 6). See also *Advisory Committee Notes on Rule 54(b)* (1961 Amendments). A premature notice of appeal has been held to be a nullity and without effect. *Studer* v. *Moore*, 153 F. 2d 902, 903 (C.A. 2); *Stevens* v. *Turner*, 222 F. 2d 352 (C.A. 7); *Aberlin* v. *Zisman*, 244 F. 2d 620 (C.A. 1), certiorari denied, 355 U.S. 857. The Commission, without urging dismissal on this ground, brought these facts and authorities to the attention of the court below, which did not comment thereon.

of appeals also held that petitioner Texas Gulf violated Section 10(b) and Rule 10b–5 by failing to exercise due diligence in issuing a misleading press release on April 12, 1964, denying rumors of a "major strike" only four days before the ore strike was formally announced. No judgment was entered against Texas Gulf.

### 1. THE COMMISSION'S COMPLAINT

On April 19, 1965, the Commission filed a complaint (JA 77a–115a)[4] in the district court alleging that, during the exploratory drilling and before the information contained in the April 16 press release became available to the public, thirteen officers, directors and employees of Texas Gulf, including petitioners, had each committed one or more of the following violations of Section 10(b) and Rule 10b–5:

> 1. Purchased Texas Gulf common stock or calls on that stock on the basis of the results of the drilling without appropriate disclosure.
>
> 2. Divulged information as to drilling results to friends, relatives or business associates for use in their purchases, without appropriate disclosure, of Texas Gulf stock or calls or recommended on the basis of such inside information that they purchase Texas Gulf securities.
>
> 3. Accepted stock options from Texas Gulf while this information as to drilling results was concealed from Texas Gulf's directors.

It also alleged that Texas Gulf had violated Section 10(b) and Rule 10b–5 by the issuance on April 12,

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[4] "JA" refers to the joint appendix in the court of appeals, a copy of which has been lodged in this Court.

1964, of a false and misleading press release about the ore deposit.

The complaint requested that the defendants be permanently enjoined from future similar violations of Section 10(b) and Rule 10b–5; that the individual defendants who had violated those provisions by purchasing Texas Gulf stock or calls be required to offer rescission to the sellers; that those who had divulged such information be required to offer restitution to stockholders who had sold Texas Gulf securities to the recipients of the information; and that stock options accepted by the defendants be rescinded (JA 113–115).

### 2. THE EVIDENCE RELEVANT TO PETITIONERS

In 1963, Texas Gulf was a narrowly-based company deriving 97 per cent of its income from sulphur (JA 1222a). Because of an over-supply of sulphur on the world market, Texas Gulf's sales and earnings had declined from 1955 to 1963, and Texas Gulf was endeavoring to deal with its depressed business by diversifying into related fields. One aspect of this diversification was an exploratory program for base metal sulphides in Canada.[5] (Pet. App. 2a–5a), which, if successful, would open a new area of corporate opportunity for the company (JA 1060a). Up to November 1963, however, the corporation had spent six years and millions of dollars in exploring more than 15,000 square miles of eastern Canada without success (Pet. App. 5a, 8a; JA 1723a).

[5] Sulphides are chemical combinations of sulphur with other elements (Pet. App. 59a n. 2).

Texas Gulf had an option to purchase the northeast quarter section of a square-mile plot of land located near Timmins, Ontario called the Kidd 55 segment (Pet. App. 6a). It had obtained the option after conducting an aerial geophysical survey, confirmed by subsequent geophysical investigations on the ground, indicating the existence of a wide "first class" anomaly [6] measuring some 1000 feet in length (Pet. App. 6a, 8a, 29a).

On November 8 through 12, 1963, Texas Gulf drilled an exploratory drill hole, K–55–1, on this section (Pet. App. 8a). Although the anomaly could have been caused by worthless materials (Pet. App. 59a n. 3), a visual examination of the core recovered from the hole revealed such high copper and zinc values over a length so great—approximately 600 consecutive feet of the core's 657-foot length (Pet. App. 27a–28a)—that four expert witnesses called by petitioners testified they had never seen or heard of a comparable initial exploratory drill hole in a base metal mineral deposit (Pet. App. 76a). Moreover, the mineralization began only 26 feet below the surface of the earth. This drill hole has been described as "one of the most impressive drill holes completed in modern times" (Pet. App. 90a n. 13) and "just beyond your wildest imagination" (Pet. App. 90a).

The "excited" company geologist, Mr. Darke, who had been at the drill site, called from Timmins to his superior Dr. Holyk at his home in Stamford, Connect-

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[6] An anomaly is a deviation from the normal in the earth's crust of such physical characteristics as electrical conductivity (R. 665).

icut, on Sunday evening, November 10, to report the initial intersection of copper mineralization (JA 723a–724a, 260a–261a). Within two days this and subsequent reports from the drill site had brought Dr. Holyk, Mr. Mollison and Dr. Fogarty, senior officials of the corporation, from New York to Timmins under conditions of great personal discomfort. There they were able to compare the visual estimates of the mineralization in the core logged by Messrs. Holyk and Darke with the actual core (JA 719a, 723a–724a, 756a–758a, 848a–850a).

As a result of the information thus obtained by the top management of Texas Gulf, security measures were taken to keep the results of the drilling secret so that the corporation could acquire the remainder of the land at favorable prices (Pet. App. 8a–9a; JA 910a–911a, 245a). These measures included an order by Mr. Stephens, the president of the corporation, that no one outside the exploration group, not even the nonmanagement directors, should be told about the drilling results (Pet. App. 47a, 75a). Drilling was suspended and was not resumed until March 31, 1964 (Pet. App. 9a).

During the four and one-half months between November 12, 1963, when K–55–1 was completed, and March 31, 1964, when the drilling was resumed on the Kidd 55 segment, the individual defendants and certain other persons who received "tips" from them purchased Texas Gulf stock and calls thereon. Prior to these transactions "these persons had owned 1135 shares of TGS stock and possessed no calls; there-

after they owned 8235 shares and possessed 12,300 calls" (Pet. App. 76a).[7]

During this period Texas Gulf granted stock options covering 89,950 shares of Texas Gulf stock to officers and employees of the company, including options covering 30,700 shares to petitioners Stephens, Fogarty, Kline, Mollison and Holyk. Pursuant to the secrecy order of the corporation's president (see p. 9, *supra*), who had recommended the granting of the options, the news of Texas Gulf's discovery of copper and zinc in Timmins had been withheld from the members of the incentive stock option committee of the board of directors (JA 329a–330a, 332a–333a, 339a–341a, 362a), which met on February 20, 1964, and recommended the granting of the options (Pet. App. 46a). After the meeting of the committee there was a meeting of the full board, at which time the recommended options were formally granted (Pet. App. 46a). None of the nonmanagement directors knew about the drilling results (Pet. App. 63a n. 16). Mr. Kline, as administrative vice president and secretary, attended both the meeting of the committee and the meeting of the full board (Pet. App. 103a; JA 401a–402a). Although the options were intended to be granted at the fair market value of the underlying stock based upon its current market price (Pet. App. 48a), neither Stephens, Fogarty nor Kline informed the committee or board about the drilling results.

Drilling on the Kidd segment was resumed by Texas Gulf on March 31, 1964, and by Friday, April 10, 1964,

[7] Individual purchases are set forth in chronological order at Pet. App. 70a–71a.

"approximately ⅔ of the ore ultimately found to exist by the time of the preparation of the April 16, 'major strike' release had been discovered by 5 holes placed so as to indicate continuity of mineralization within the large anomaly" (Pet. App. 114a n. 28). By 7:00 a.m. on Monday, April 13, 1964, when Texas Gulf's "gloomy" press release appeared in New York City newspapers (Pet. App. 58a), all but one of the seven holes upon which Texas Gulf based its April 16 announcement that it had made a "major strike" had either been completed or had already encountered mineralization (Pet. App. 8a–12a).[8]

The "gloomy" press release was "designed to quell the rumors" reported in New York newspapers on Saturday, April 11, 1964, respecting the ore discovery by Texas Gulf (Pet. App. 78a). On that day Dr. Fogarty conferred with Mr. Mollison, who had left Timmins the preceding day and returned to his home in Connecticut, and who advised Dr. Fogarty of the drilling results as of 7:00 p.m. April 10 (Pet. App. 53a). On Sunday, April 12, 1964, after the release had been drafted for Monday morning publication, Dr. Fogarty again called Mr. Mollison to see if he had any further information and was told that he did not (Pet. App. 54a). Despite the rapidly developing situation at Timmins (Pet. App. 10a–11a, 59a n. 4), the draftsmen of the release made no effort to determine what had happened at the drill site between Friday evening and

[8] The mineralization encountered by these six holes as of that time amounted to 90 percent of the mineralization announced in the April 16 press release (Pet. App. 114a n. 28).

Sunday afternoon.[9] Dr. Fogarty, the principal draftsman of the release, admitted that he did not want "to take that trouble" to obtain such information (J.A. 863a).

Notwithstanding the fact that none of the "drilling results after 7:00 p.m. on April 10 were known to the framers of the April 12 release" (Pet. App. 57a), the release (Pet. App. 177a–178a), which was issued Sunday afternoon and designed to appear in Monday's papers, spoke in terms of "[t]he drilling done to date" and "work done to date." It labeled the rumors of an ore discovery as "exaggerate[d]" and "without factual basis"; it indicated that any statements about size and grade of ore were "premature and possibly misleading"; it labeled the Kidd 55 segment a "prospect" and indicated that "more drilling would be required for proper evaluation * * *." The release did not give any facts concerning the amount of drilling done nor the results of such drilling.

Stories reflecting the release appeared in the *Wall Street Journal* and other news media on Monday, April 13, 1964, as well as on the Dow Jones broad tape (Pet. App. 188a).[10] The price of Texas Gulf common

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[9] There were no problems with respect to telephone communication between New York and Timmins (JA 774a), and both Messrs. Darke and Clayton were in Timmins on April 12 (Pet. App. 37a; JA 731a).

[10] On the morning of April 13, the day the press release was disseminated to the investing public, Mr. Ackerley, a reporter for *The Northern Miner*, visited the drill site, where Messrs. Mollison, Holyk and Darke were present. Based entirely on the information obtained that morning (Pet. App. 56a; JA 833a–834a), Mr. Ackerley wrote an article that appeared in *The*

stock on the New York Stock Exchange, which had shown a steady rise from $16 a share in November 1963 to $32 a share when it opened on the Exchange on April 13, 1964, closed at 30⅞, and continued to decline in price on April 14 and 15 (Pet. App. 83a).

On the afternoon of April 15, the top management of Texas Gulf decided to hold a press conference the next morning, following a regularly scheduled meeting of the board of directors, to announce the discovery (JA 867a–868a).[11] This method of announcing the major ore discovery was chosen "to get the information to the most stockholders as quickly as it was possible," and because the board considered a press conference to be "the best media [sic] to get maximum coverage to everyone at the same time." (JA 869a–870a). Following the news of the discovery, on substantially increased trading, the price of Texas Gulf common stock on the Exchange closed on April 16, 1964, at 36⅜, seven points over its close of the previous day. By mid-May the stock was trading at more than $58 a share (Pet. App. 83a).

During the period of drilling activity from March 31, 1964, to April 16, 1964, defendants purchased an additional 1860 shares of Texas Gulf stock (Pet. App. 70a). Among these purchases were those made by Messrs. Crawford and Clayton "within 24

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*Northern Miner* on April 16, 1964, which stated that "a major new zinc-copper-silver mine is definitely in the making * * *" and mentioned an indicated ore reserve of more than 10 million tons (Pet. App. 82a, 34a–35a).

[11] This was the first time in at least 14 years that a Texas Gulf directors' meeting was to be followed by a press conference (JA 869a, 847a).

hours before the news of the ore strike was made public" on April 16 (Pet. App. 225a). At the time of their purchases both were aware of the April 12 press release (Pet. App. 39a, 101a) and both knew "beyond peradventure of a doubt" that Texas Gulf "had made a very important mineral discovery" (Pet. App. 197a).

### 3. THE JUDICIAL DECISIONS

#### A. THE INITIAL DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS: THE VIOLATIONS [12]

The district court and all the judges of the court of appeals sitting *en banc* agreed that Section 10(b) and Rule 10b–5 prohibit corporate insiders from purchasing their corporation's securities or calls thereon on a national securities exchange when the purchases are made on the basis of material information about the corporation which is not available to the investing public (Pet. App. 20a–24a, 73a–74a, 119a, 128a, 170a). They also agreed that any member of top management who accepted a stock option from a corporation while withholding material information from the directors would also violate Section 10(b) and Rule 10b–5 (Pet. App. 48a-49a, 73a, 119a–121a, 128a, 146a–147a).[13] Furthermore, they agreed that in enforcement actions

[12] Pursuant to a stipulation by all parties the question of the appropriate remedy was deferred pending the initial appeal; therefore the first round of decisions by the district court and the court of appeals dealt with the question whether violations of the Securities Exchange Act had occurred.

[13] Both courts apparently recognized that in granting incentive stock options the directors of the company necessarily rely on information furnished to them by the top management of the corporation (Pet. App. 47a), and that the latter are there-

under Section 10(b) and Rule 10b–5 the Commission need not prove scienter or intent to deceive (Pet. App. 18a–20a, 99a–100a, 119a, 128a, 170a).

### INSIDERS PURCHASING TEXAS GULF STOCK AND "TIPPING" OTHERS TO PURCHASE

The district court held that the persons who had purchased stock or calls or had recommended purchase of Texas Gulf stock to others prior to 7:00 p.m. on April 9, 1964, when the court found that there was "real evidence that a body of commercially mineable ore might exist" (Pet. App. 28a–29a), did not violate Rule 10b–5 because in its view the drilling results had not been material up to that time (Pet. App. 33a–34a). While the district judge found that "[t]here was no doubt that the [first] drill core * * * was unusually good and that it excited the interest and speculation of those who knew about it" (Pet. App. 29a), he believed that "* * * the test of materiality must necessarily be a conservative one * * *" and that only long-term, conservative investors were protected against misuse of inside information (Pet. App. 25a–26a). Only Messrs. Clayton and Crawford, who had purchased or placed orders to purchase Texas Gulf securities just prior to the April 16 announcement of a "major strike", were found to have violated Section 10(b) and Rule 10b–5.

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fore "under a duty to inform * * * [them] of material information affecting the issuance of the stock options," including "material information bearing on the market value of * * * [the] stock on that date" (Pet. App. 48a). There were, however, some differences of opinion as to when disclosure would be appropriate (Pet. App. 103a n. 24, 119a–121a, 146a–147a).

The court of appeals, while relying on the trial court's "findings of basic fact" (Pet. App. 89a), rejected that court's "conservative" (Pet. App. 87a–88a) standard of materiality. In determining whether the facts involved here were material, it noted two alternative phrasings of the standard of materiality applicable in Rule 10b–5 cases: "'* * * whether a *reasonable* man would attach importance * * * [to the information] in determining his choice of action in the transaction in question,'" and whether "'* * * in reasonable and objective contemplation [the information] *might* affect the value of the corporation's stock or securities * * *'" (Pet. App. 87a, emphasis in original). It held that all investors, including those with speculative objectives, are entitled to the protection of the Act (Pet. App. 88a), and it ruled that the information about the first drill core was material, since it "might well have affected the price of TGS stock and would certainly have been an important fact to a reasonable, if speculative, investor in deciding whether he should buy, sell, or hold" (Pet. App. 89a).[14]

[14] The court criticized the trial court for disregarding "the only truly objective evidence of the materiality of the K–55–1 discovery"—"the importance attached to the drilling results by those who knew about it" and their "insider trading activity" (Pet. App. 91a). It concluded that "the timing by those who knew of it of their stock purchases and their purchases of *short-term* calls—purchases in some cases by individuals who had never before purchased calls or even TGS stock—virtually compels the inference that the insiders were influenced by the drilling results." The trial court had "made no finding that the insiders were motivated by any factor other than the extraordinary K–55–1 discovery when they bought their stock and their

Accordingly, the court of appeals reversed the district court, holding that those insiders who had purchased Texas Gulf stock or calls thereon, or who had "tipped" others to purchase Texas Gulf stock [15] after November 12, 1963, were in possession of material inside information and therefore, having failed to disclose that information, were in violation of Section 10(b) and Rule 10b–5 (Pet. App. 73a–74a). The court remanded the case to the district court to determine the appropriate remedy (*ibid.*). At the same time the court unanimously affirmed the district court's judgment with respect to Messrs. Crawford and Clayton, who had purchased Texas Gulf stock just prior to the April 16 release (Pet. App. 73a, 170a).

INSIDERS' ACCEPTANCE OF STOCK OPTIONS

With respect to those who received stock options, the district judge found no violations because he viewed the drilling results as not material by February 20, 1964, the date on which the options were granted (Pet.

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calls" but had relied "upon what these defense experts said the defendant insiders *ought* to have thought about the worth to TGS of the K–55–1 discovery." *Id.*

For example, Dr. Fogarty, who owned 705 shares of Texas Gulf stock before this period of time (JA 235a), purchased 300 shares of Texas Gulf stock on November 12, 1963, just before he left for Timmins to view the "remarkable" core for himself. (Pet. App. 13a; JA 850a). Following his return, he purchased 700 shares of Texas Gulf stock on November 15, 1963, and 500 shares on November 19, 1963 (Pet. App. 13a). On November 26, 1963, he purchased another 200 shares (Pet. App. 13a).

[15] All nine judges of the court of appeals appeared to agree that the practice of tipping is unlawful, although they differed as to the scope of the prohibition (Pet. App. 86a, 94a n. 16, 170a).

App. 49a). In addition, the court determined that Messrs. Kline, Mollison and Holyk were not members of top management and had no duty to inform the directors of information known by their superiors "since they could assume that such information would be reported" to them by Stephens and Fogarty, the company's top two officials (Pet. App. 48a).

The court of appeals reversed the district court with respect to Messrs. Stephens, Fogarty and Kline, holding that they violated Section 10(b) and Rule 10b-5 because they were in possession of material information when they accepted their stock options, and remanded the case for a determination of the appropriate remedy (Pet. App. 118a). In addition, with respect to Mr. Kline it decided that he was a member of top management [16] (Pet. App. 103a) and that, although he "had no detailed knowledge of the drilling progress * * *" (Pet. App. 102a), he violated his "duty before accepting his option to disclose any material information he may have possessed * * *" (Pet. App. 103a). Mr. Stephens and Dr. Fogarty had surrendered their options and these had been canceled by the company (Pet. App. 102a). The court of appeals on remand instructed the district court to direct rescission of the option granted to Mr. Kline (Pet. App. 118a).

### TEXAS GULF'S APRIL 12, 1964, PRESS RELEASE

The trial court held that the press release was not issued "in connection with the purchase or sale of any

[16] The Commission did not appeal the trial court's determination that Messrs. Mollison and Holyk were not members of top management (Pet. App. 103a–104a).

security" within the meaning of Section 10(b) and Rule 10b–5 because there was no "showing that the purpose of the April 12 press release was to affect the market price of TGS stock to the advantage of TGS or its insiders * * *" (Pet. App. 54a). Alternatively, the court concluded that although the drilling results as of 7:00 p.m. April 9, 1964, were material, the press release, while perhaps "gloomy or incomplete," was not misleading or deceptive "on the basis of the facts then known" to Texas Gulf—the drilling results as of 7:00 p.m. April 10, 1964—(Pet. App. 58a). Moreover, without reference to the failure by the company to secure more up-to-date drilling information, the district court found that Messrs. Stephens and Fogarty had "exercised reasonable business judgment under the circumstances" in issuing the release on "the facts then known" (Pet. App. 58a).

Reversing the district court, the court of appeals held that the "in connection with" requirement in Section 10(b) and the Rule is satisfied when "* * * the device employed * * * be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities" (Pet. App. 109a). It further determined that the Commission, which was "charged by Congress with the responsibility of policing all misleading corporate statements" (Pet. App. 111a), need not show that the corporation or those responsible for the corporate statements "engaged in related securities transactions or otherwise acted with wrongful motives" (Pet. App. 109a). To read such a

requirement into the statute it concluded would "render the Congressional purposes ineffective" and "handicap unreasonably the Commission in its work" (Pet. App. 111a). Accordingly, it held (Pet. App. 113a) that

> * * * Rule 10b–5 is violated whenever assertions are made, as here, in a manner reasonably calculated to influence the investing public, e.g., by means of the financial media * * * if such assertions are false or misleading or are so incomplete as to mislead irrespective of whether the issuance of the release was motivated by corporate officials for ulterior purposes. * * *

In determining "whether the release was misleading, *i.e.*, whether it conveyed to the public a false impression of the drilling situation at the time of its issuance," the court rejected the district court's test that Texas Gulf was to "be judged *on the facts known to them* when the April 12 release was issued" (Pet. App. 113a, emphasis in original.) The "primary inquiry," in the view of the court of appeals, was "the meaning of the statement to the reasonable investor and its relationship to truth" (Pet. App. 114a).

While several of the court of appeals judges thought that the evidence established as a matter of law that Texas Gulf's April 12, 1964, press release was misleading and that its issuance violated Section 10(b) and Rule 10b–5 (Pet. App. 129a, 121a–122a, 128a), four judges were of the view that they could not "definitively conclude" from the record that it was deceptive or misleading to the reasonable investor (Pet. App. 115a). Accordingly, the district court was di-

rected to determine on remand "the character of the release in light of the facts existing at the time of the release, by applying the standard of whether the reasonable investor, in the exercise of due care, would have been misled by it" (*ibid.*). If so, the district court was to determine not whether Texas Gulf had "exercised 'reasonable *business* judgment under the circumstances'" but whether "the misleading statement resulted from a lack of due diligence on the part of" Texas Gulf (Pet. App. 116a, emphasis in original).

### B. The Subsequent Decisions of the District Court and the Court of Appeals: The Appropriate Remedy.

#### THE INDIVIDUAL DEFENDANTS

On remand, following an evidentiary hearing, the trial court denied all relief against Messrs. Fogarty, Mollison and Stephens, finding that they had surrendered to Texas Gulf at their cost and without profit the stock or stock options they had acquired in violation of Rule 10b–5. The court found that the wide publicity accorded these defendants would serve as an adequate deterrent to future violations (Pet. App. 196a, 211a–212a), for which reason the trial court also refused to enjoin most of the other defendants (Pet. App. 196a–197a). The court issued injunctions, however, against Messrs. Crawford and Clayton, whose violations of Section 10(b) and Rule 10b–5 the court of appeals *en banc* had unanimously upheld (*supra*, p. 17), and who had "* * * purchased during the period of nondisclosure knowing beyond peradventure

of a doubt that TGS had made a very important mineral discovery" (Pet. App. 197a).

Pursuant to the Commission's request for relief other than injunctive, the district court also directed that defendants Darke, Holyk, Huntington and Clayton be deprived of the profits from their purchases of Texas Gulf stock or of calls on Texas Gulf stock on the basis of inside information, and that these profits be paid over to Texas Gulf to be held in escrow (Pet. App. 197a–210a). The court concluded that to do so was in accord with the congressional purpose to "protect the investing public by deterring possible future violations of Section 10(b) and Rule 10b–5" (Pet. App. 203a). Pursuant to the appellate court's instructions to determine the appropriate remedy for defendant Darke's "tipping" of other investors (Pet. App. 74a), the district court distinguished between "those who purchased TGS securities on Darke's recommendation and those who purchased on the recommendation of one of Darke's 'tippees' " and concluded that it would be a "sufficient deterrent" to direct Darke to pay Texas Gulf to hold in escrow "the profits realized by the 'tippees' who purchased on Darke's recommendation * * *" (Pet. App. 206a–207a).

With respect to Mr. Kline, the court refused to enjoin him from violating Section 10(b) and Rule 10b–5 by accepting Texas Gulf stock options while possessing material inside information (Pet. App. 213a). Pursuant to the mandate of the court of appeals, however, it entered judgment against him and directed

that he return his option to Texas Gulf to be cancelled (Pet. App. 212a–213a).

The court of appeals affirmed the judgment of the district court as to the individual defendants except with respect to Mr. Kline.[17] As to the remedy, the court affirmed the Commission's authority, pursuant to Section 21(e) to seek restitution, and an equity court's power, pursuant to Section 27, to grant that remedy as ancillary relief (Pet. App. 226a–230a).

TEXAS GULF'S APRIL 12, 1964, PRESS RELEASE

As to Texas Gulf, the district court, after reviewing the testimony of investor witnesses who had seen reports of the April 12 release in the news media,[18] held

[17] The court reversed the judgment ordering cancellation of Mr. Kline's option and, in effect, confessed error, noting that its prior "unambiguous instruction" ordering cancellation after the parties had specifically deferred the question of remedy deprived Mr. Kline of his day in court on that question (Pet. App. 230a). The case was remanded to the trial court (Pet. App. 231a), where on August 11, 1971, a hearing was held. On September 1, 1971, the trial court, in a memorandum opinion determined that, rather than cancelling his option, Mr. Kline should be deprived of any illegal profits obtained from the exercise of his option. *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, CCH Fed. Sec. L. Rep. ¶ 93,211 (S.D. N.Y., 1971). Judgment was entered on October 4, 1971.

[18] Texas Gulf asserted that it could only be held responsible for "the press release itself, not for the 'inaccurate or incomplete' version carried by the news media" (Pet. App. 188a). However the court rejected this argument stating:

"By issuing the press release 'For Immediate Release,' TGS was depending on the news media to report it to its shareholders. They could not have expected the news media to publish the entire press release, but only those portions which the media deemed important." (Pet. App. 189a). [continued]

"[o]n the basis of the standards laid down by the Court of Appeals," that the press release was "misleading to the reasonable investor using due care" and that "the framers did not exercise due diligence in its issuance" (Pet. App. 188a); therefore, the court ruled that Texas Gulf had violated Section 10(b) and Rule 10b–5. It noted, however, that there was no evidence of any other misleading press releases issued by the company in almost five years since the Timmins discovery, which the court termed a "'once-in-a-lifetime affair,'"; accordingly, it held that there was "no 'proper showing'" of any reasonable likelihood of future violations (Pet. App. 192a), and did not issue an injunction against the company.

The court of appeals held that the finding that Texas Gulf violated Rule 10b–5 "is well-founded and, in our view, unassailable" (Pet. App. 225a). The court concluded that the trial court did not abuse its discretion by allowing the admission of non-expert opinion testimony from investor witnesses, on the ground that their testimony was relevant to "[t]he ultimate issue [of] whether the release was 'misleading to the reasonable investor'" (Pet. App. 222a–223a). It also rejected Texas Gulf's claim that the finding of a violation of Rule 10b–5 for mere negligence in issuing the press

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Moreover, it pointed out:

"the fact that the news media emphasized the words which have been found to be misleading to the reasonable investor merely indicates that the news media also deemed them of importance. The failure of the broad tape to mention that a later statement would be issued indicates only that Dow Jones considered it relatively unimportant." (*Ibid.*)

release infringes its First Amendment rights, holding that Texas Gulf's April 12 report on its drilling progress was "commercial 'factual' speech" and, like other reports submitted by companies under the federal securities laws, was not within the protection afforded by the First Amendment (Pet. App. 224a–225a).

## ARGUMENT

The courts below correctly rejected petitioners' narrow reading of Section 10(b) of the Securities Exchange Act and Rule 10b–5, both with respect to the scope of the activities covered and to the commission's remedies available in the event of violation. The court of appeals' holdings on these issues are not in conflict with decisions of other courts of appeals. Nor have petitioners raised any constitutional issues worthy of review. Indeed, although this case resolved several important questions, especially with respect to the use of inside information by corporate officials and a corporation's responsibility for the issuance of its press releases, the results reached by the court of appeals follow logically from the development of the federal securities laws in this area.[19]

More than six years have elapsed since the filing of the Commission's complaint, and more than three

[19] See Jennings, *Insider Trading in Corporate Securities: A Survey of the Hazards and Disclosure Obligations under Rule 10b–5*, 62 Nw. U. L. Rev. 809 (1968); Fleischer, *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding*, 51 Va. L. Rev. 1271 (1965); *Curent Policy Issues Involving Inside Information in the Securities Markets*, reprinted in 2 Securities L. Rev. 84 (1970).

years since the initial court of appeals opinion, yet none of the concerns expressed by the corporate and financial communities when the complaint was filed have been realized. There is no evidence, for example, that corporate announcements have been curtailed to the injury of the investing public or that competent corporate officials have left their employment for want of adequate forms of remuneration. Indeed, in general it appears that the business community has adapted its standards of conduct to conform with the principles set forth by the courts below without significant difficulty.[20] Petitioners appear to be more concerned with potential liability arising from private civil damage actions than with any alleged inconvenience to the corporate community; private civil actions, however, raise questions substantially different from those raised in Commission enforcement proceedings, which are brought in the public interest. There is no reason for the Court to address itself to those problems here.

1. We note at the outset that no judgment has been entered against petitioners Texas Gulf, Stephens, Fogarty or Mollison, nor do they contend that the findings[21] of which they complain have any effect in

[20] See *e.g.*, *New York Stock Exchange Company Manual* A-18—A-27 (1968); *American Stock Exchange Company Guide* § 401–406 (1970); see also West, *Timely Disclosure—The View from 11 Wall Street*, 24 Sw. L. J. 241 (1970); see generally, Bromberg, *Disclosure Programs for Publicly Held Companies—a Practical Guide*, 1970 Duke L. J. 1139.

[21] The recitals in the judgment cannot be characterized as a judgment against these petitioners. Cf. *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242.

other actions against them. In these circumstances a party is not normally entitled to review of findings with which he does not agree, unless those findings would constitute *res judicata* or serve as the basis for collateral estoppel. See, *e.g., New York Telephone Company* v. *Maltbie,* 291 U.S. 645; *Partmar Corp.* v. *Paramount Pictures Theatre Corp.,* 347 U.S. 89, 99 n. 6.[22] As to petitioner Kline, the order from which he seeks review remanded his case to the district court for a determination of the appropriate remedy. Judgment was subsequently entered against him on October 4, 1971,[23] but no appeal from that judgment has as yet been taken. The posture of his case is, therefore, comparable to its posture at the time this Court denied his earlier petition. 394 U.S. 976.

2. Petitioners contend (TG Pet. 21, 34–35) that the Commission, in an enforcement action brought

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[22] Subsequent cases have not held these findings to be *res judicata* or to have a collateral estoppel effect. See *Fink* v. *Coates,* 323 F. Supp. 988 (S.D. N.Y.), and *Cannon* v. *Texas Gulf Sulphur Co.,* 323 F. Supp. 990 (S.D. N.Y.); see also *Rachal* v. *Hill,* 435 F. 2d 59 (C.A. 5), certiorari denied, 403 U.S. 904. But Cf. *Sullivan* v. *Committee on Admissions and Grievances,* 395 F. 2d 594 (C.A. D.C.).

[23] The district court stated in its opinion on remand:

"Mr. Kline took the stand to stress the borderline nature of his violation and was vigorously cross-examined by the Commission. On the evidence, this Court cannot conclude that Mr. Kline knew less about the discovery than what the Court of Appeals found was sufficient basis for a violation of the Act and of the Rule. Indeed, in view of his trip to Utah with Mr. Fogarty a few days after November 12, 1963 and his responsibilities as General Counsel, it may be that he knew more about the initial drill hole than he originally testified to at the trial." *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co., supra,* CCH Fed. Sec. L. Rep. ¶93,211 at 91,350.

in the public interest, must prove all the elements of an ordinary damage suit, including scienter, intent to deceive, reliance, and consequent damages. This Court has noted, however, in *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193, 200, involving an enforcement proceeding under the analogous antifraud provision of the Investment Advisers Act of 1940, 15 U.S.C. 80b–6, that "[i]t is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages" and that "[t]o impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute."

Indeed, petitioners' restrictive construction of Section 10(b) of the Securities Exchange Act conflicts with the principle that "securities legislation 'enacted for the purpose of avoiding frauds'" is to be construed "flexibly to effectuate its remedial purposes," without regard to technical and restrictive notions of intent. *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc., supra,* 375 U.S. at 195; see also, *Tcherepnin* v. *Knight*, 389 U.S. 332, 336; cf. *Ellis* v. *United States,* 206 U.S. 246, 257. In passing the Act, Congress recognized that "[s]peculation, maniulation, * * * investors' ignorance, and disregard of trust relationships by those whom the law should regard as fiduciaries" were "all a single seamless web * * *" H.R. Rep. No. 1383, 73rd Cong., 2d Sess., 6

(1934). As this Court has recently observed with respect to the quoted congressional language:

> Since practices "constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers" in the regulatory agency "have been found practically essential." Id., at 7. Hence * * * Section 10(b) must be read flexibly, not technically and restrictively. Since there was a "sale" of a security and since fraud was used "in connection with" it, there is redress under § 10(b), whatever might be available as a remedy under state law.[24] [Superintendent of Insurance of New York v. Banker's Life and Casualty, No. 70–60, decided Nov. 8, 1971, slip op., pp. 5–6.]

The decision of the court below, in recognizing that the scope of Section 10(b) was intended to be as broad as the Act itself (Pet. App. 92a–93a; 105a–113a), serving as a "catchall" to fill gaps left by more specific provisions,[25] is in accord with the decisions of this Court and other courts of appeals.[26]

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[24] See also, 78 Cong. Rec. 7696 (1934) (Remarks of Rep. Rayburn). The Senate Committee viewed the Securities Act of 1933 and the Securities Exchange Act of 1934 as vesting "in the Securities and Exchange Commission jurisdiction over the source of and traffic in securities." S. Rep. No. 1455, 73d Cong., 2d Sess. 393 (1934).

[25] *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7852 and 8720*, 73d Cong., 2d Sess. 115 (1934); see also H. Rep. No. 1383, 73d Cong., 2d Sess. 6–7 (1934), and S. Rep. No. 792, 73d Cong., 2d Sess. 5–6 (1934).

[26] See *Herpich* v. *Wallace*, 430 F. 2d 792, 806 (C.A. 5); *Rekant* v. *Desser*, 425 F. 2d 872 (C.A. 5); *Kahan* v. *Rosenstiel*, 424 F. 2d 161, 172 (C.A. 3), certiorari denied *sub nom. Glen Alden Corp.* v. *Kahan*, 398 U.S. 950; *Matheson* v. *Armbrust*, 284 F. 2d 670, 674 (C.A. 9). See also *Heit* v. *Weitzen*, 402 F. 2d 909 (C.A. 2), certiorari denied, 395 U.S. 903.

3. The courts below correctly held that the April 12 press release, which was issued to counteract the market effect of newspaper reports (J.A. 853a, 854a, 863a, 866a–867a, 939a), was issued "in connection with" the purchase and sale of securities (Pet. App. 105a–113a). The "in connection with" clause in Section 10(b) has been described as "plainly and—one must assume—intentionally the loosest linkage, in any of the federal antifraud provisions, between a proscribed act and a security transaction."[27] *Cf. Superintendent of Insurance of New York* v. *Bankers Life and Casualty, supra.* As noted by the court below, comparison with the other antifraud provisions in the federal securities laws makes clear "that when Congress intended that there be a participation in a securities transaction as a prerequisite of a violation, it knew how to make that intention clear" (Pet. App. 109a). The Second Circuit's construction of this phrase[28] is consistent with that of other courts.[29]

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[27] Bromberg, *Securities Law: Fraud-SEC Rule 10b-5*, § 7.6(1) at 190.21.

[28] See also *Securities and Exchange Commission* v. *Great American Industries, Inc.*, 407 F. 2d 453 (*en banc*), certiorari denied, 395 U.S. 920; *Heit* v. *Weitzen, supra*, 402 F. 2d 909. But see, *Superintendent of Insurance of New York* v. *Bankers Life and Casualty*, 430 F. 2d 355 (C.A. 2), reversed this Term, No. 70-60, November 1, 1971.

[29] See, *e.g.*, *Herpich* v. *Wallace, supra*, 430 F. 2d 792; *Kahan* v. *Rosenstiel, supra*, 424 F. 2d at 172; *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195 (C.A. 5), certiorari denied, 365 U.S. 814; *Freed* v. *Szabo Food Service, Inc.*, CCH Fed. Sec. L. Rep. ¶91,317 (N.D. Ill.); *Stockwell* v. *Reynolds & Co.*, 252 F. Supp. 215 (S.D. N.Y.); *Meisel* v. *North Jersey Trust Co.*, 218 F. Supp. 274, 279 (S.D. N.Y.).

The fact that Congress specifically provided for the filing of periodic and other specified reports with the Commission [20] does not imply, as Texas Gulf suggests (TG Pet. 24), that Congress intended that other corporate reports and announcements be unregulated. One of the basic purposes of the Act was "to insure the maintenance of fair and honest markets" in securities transactions,[21] and as the House Report on the bill stated, "There cannot be honest markets without honest publicity. * * *" [22] Furthermore, the decision below does not, as petitioner Texas Gulf implies (TG Pet. 25), require directors to guarantee the accuracy of every statement which the company makes. The decision requires merely that persons preparing a press release which will affect the market for their corporation's securities use "due diligence" in reporting the facts.

Texas Gulf complains (TG Pet. 26) that the court of appeals' standard [23] for judging the press release—

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[20] See Sections 13 and 15(d) of the Act, 15 U.S.C. 78m, 78o(d). The Commission has established a detailed reporting system under these provisions. See Rules 13a-1 to 13b-1, 15d-1 to 15d-21, 17 CFR 240.13a-1 to 240.13b-1, 240.15d-1 to 240.15d-21. It is, of course, implicit in the reporting requirements that the documents filed with the Commission must be complete and accurate.

[21] Section 2 of the Act, 15 U.S.C. 78b.

[22] H. Rep. No. 1383, 73d Cong., 2d Sess. 11 (1934).

[23] In assuming that the court of appeals' standard is based on "the subjective reactions of persons in the market" (TG Pet. 26), petitioners fail to distinguish between the opinion testimony of investor-witnesses, which was relevant to the ultimate issue, and the ultimate issue itself, *i.e.*, whether the re-

"whether the reasonable investor, in the exercise of due care, would have been misled by it" (Pet. App. 115a)—is excessively subjective. In fact, this standard is no more subjective than the reasonable man standard uniformly employed in tort law. See Prosser, *Torts*, 153–168 (Hornbook ed., 1964). Furthermore, the court correctly determined that Texas Gulf's conduct should be judged "in the light of the facts existing at the time of the release" (Pet. App. 115a), and that a finding of violation required also the determination that, in light of these facts, the draftsmen failed to exercise "due diligence" (Pet. App. 116a). The district court's initial finding that "on the basis of the facts known to its draftsmen at the time of its preparation" the press release was an exercise of "reasonable business judgment" (Pet. App. 116a) cannot be equated with a finding of "due diligence" under the court of appeals' test, as Texas Gulf asserts (TG Pet. 26–27). The district court recognized this distinction in finding on remand that "on the basis of the standards laid down by the Court of Appeals * * * the framers of the press release failed to exercise due diligence" (Pet. App. 188a).

4. The court of appeals applied two alternative phrasings of the standard of materiality applicable in Rule 10b–5 cases: that the information is important

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lease was misleading to the reasonable investor (Pet. App. 222a). The Commission offered testimony of investor witnesses solely to buttress its contention that the release on its face was misleading.

to a "reasonable" investor and that "in reasonable and objective contemplation" it might affect the market price of the stock (see p. 16, *supra*).[24] Other courts of appeals have adopted both of these standards.[25] Of

[24] Petitioners argue that the court of appeals correctly stated that a *substantial* prospective market impact is necessary to render inside information material and then departed from this standard by dispensing with the requirement of substantiality (HDC Pet. 13; H. Pet. 9–11). We read the phrase "in reasonable and objective contemplation," used by the court below in this case (Pet. App. 87a) and in its earlier decision cited by petitioners (TG Pet. 21), *List* v. *Fashion Parks, Inc.*, 340 F. 2d 457, 462, (C.A. 2), certiorari denied *sub nom. List* v. *Lerner*, 382 U.S. 811, to exclude matters which might cause insubstantial market fluctuations. Moreover, it is difficult to see how investment judgment could be affected without affecting market value.

[25] *Myzel* v. *Fields*, 386 F. 2d 718, 734 and n. 7 (C.A. 8), certiorari denied, 390 U.S. 951; *Rogen* v. *Ilikon Corp.*, 361 F. 2d 260, 266 (C.A. 1); *Kohler* v. *Kohler Co.*, 319 F. 2d 634, 642 (C.A. 7); accord, *Securities and Exchange Commission* v. *R. A. Holman & Co.*, 366 F. 2d 456, 458, rehearing denied *per curiam*, 377 F. 2d 665 (C.A. 2), certiorari denied, 389 U.S. 991; *List* v. *Fashion Park, Inc.*, *supra*, 340 F. 2d at 462. The Second Circuit has used the first phrasing subsequent to the decision below, with one of the two dissenting judges here joining in the opinion. *Securities and Exchange Commission* v. *Great American Industries, Inc.*, *supra*, 407 F. 2d at 459–466. See also, *e.g.*, *Lehigh Valley Trust Co.* v. *Central National Bank*, 409 F. 2d 989, 993 (C.A. 5); *Northwest Paper Corp.* v. *Thompson*, 421 F. 2d 137, 138 (C.A. 9); *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167, 1171 (C.A. 2). And cf. opinion of Justice Harlan in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 384, to the effect that a material fact in a proxy statement is one "of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote."

the two courts of appeals' decisions which petitioners claim are inconsistent with that of the court below (TG Pet. 31–32), one, *James Blackstone Memorial Library Assn'* v. *Gulf, M. & O. R.R. Co.*, 264 F. 2d 445, 450–451 (C.A. 7), certiorari denied, 361 U.S. 815, is an earlier decision of one of the courts which has since specifically adopted the second phrasing (see n. 35, *supra*), and in any event the undisclosed information involved in that case could not possibly have affected the fair market value of the plaintiff's stock.[36] The other, *Sunray Oil Co.* v. *Helmerich & Payne, Inc.*, 398 F. 2d 447 (C.A. 10), does not articulate any standard of materiality, and there is no indication that the drilling results in that case were in any way comparable to the "remarkable discovery" of Texas Gulf (R. 1717; see pp. 8, 13, *supra*);[37] moreover, two of the three judges who decided *Sunray* specifically held that case inapplicable in *Mitchell* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 90, 100 (C.A. 10), petition for certiorari filed (No. 71–421).

In refusing to limit the concept of "reasonable" investors to whom information might be material to long-term, "conservative" investors, the court of ap-

[36] The undisclosed information concerned the possibility that certain property in the corporation's name might be sold to the government at an advantageous price. All the property of the corporation had already been leased to another party in perpetuity, however, and a sale at large profit would not have affected the guaranteed dividend, which is all that plaintiffs were entitled to receive. 264 F. 2d at 447–448, 450.

[37] Neither of the two well holes in the *Sunray* case was on the land where the company had drilling rights; one was more than a mile away. See unreported findings of fact and conclusions of law in the district court, p. 7, No. 68 C 92 (N.D. Okla.)

peals did not depart from the traditional test of materiality, as Texas Gulf suggests (TG Pet. 31). The Act protects speculators as well as conservative investors. Although one of the purposes of the Act was to curb *excessive* speculation, the House Committee Report stated: "There is plenty of room for legitimate speculation in the balancing of investment demand and supply * * *. No investor, no speculator can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells."[28] Certain of the filings with the Commission required under the Securities Act of 1933 relate to securities which would be of interest only to speculators[29] while others describe securities that might appeal to more conservative investors.

Having rejected the test of materiality applied by the district court (see p. 16 *supra*,) the court of appeals in reviewing the district court's decision was not bound, as petitioners contend (HDC Pet. 15–17; H. Pet. 15–17; TG Pet. 36–37), by that court's conclusions as to materiality. This Court has repeatedy held that Rule 52(a) of the Federal Rules of Civil Procedure does not cover findings of fact based upon the application of erroneous legal standards to undisputed eviden-

[28] H. Rep No. 1383, 73d Cong., 2d Sess. 11 (1934).

[29] The Commission has a special registration form for securities of a speculative nature, which must be so labeled. Form S–2, General Instruction D(b), reprinted in 1 CCH Fed. Sec. Law Rep. ¶7142, at 6241–6242; see, also, Form S–3, General Instruction E(b), reprinted in 1 CCH Fed. Sec. Law Rep. ¶7152, at 6262.

tiary facts. *E.g., United States* v. *General Motors Corp.*, 384 U.S. 127, 142 n. 16; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44.[40]

5. All of the judges of the court of appeals sitting *en banc*, as well as the district judge agreed that Section 10(b) and Rule 10b–5 prohibit a corporate insider from trading in his corporation's securities on the basis of important inside information not available to the public. This is also the view of all other federal courts that have considered the matter.[41] Contrary to petitioners' argument that they had no "fair warning" as to this meaning of Rule 10b–5 (TG Pet. 38–39), the Commission has repeatedly expressed this interpretation of its rule in formal adjudications,[42] in

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[40] See generally, 5 Moore's *Federal Practice* ¶52.03[3] and 52.04. The fact that other provisions of the securities acts have been interpreted to contain differing definitions of materiality does not affect the applicable standard in this case (see TG Pet. 30). Cf. *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 466.

[41] *E.g., Myzel* v. *Fields*, *supra*, 386 F. 2d 718; *List v. Fashion Park, Inc.*, *supra*, 340 F. 2d 457, 461–462; *Kohler* v. *Kohler Co.*, *supra*, 319 F. 2d 634; *Reed* v. *Riddle Airlines*, 266 F. 2d 314 (C.A. 5); *Cochran* v. *Channing Corp.*, 211 F. Supp. 239, 242–243 (S.D.N.Y.); *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808 (D. Del.), final judgment awarded, 135 F. Supp. 176 (D. Del.), affirmed as modified, 235 F. 2d 369 (C.A. 3); *Kardon* v. *National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa.), modified in other respects, 83 F. Supp. 613 (E.D. Pa.); *Mansfield Hardwood Lumber Co.* v. *Johnson*, 268 F. 2d 317, 319 n. 3 (C.A. 5) (dictum), certiorari denied, 361 U.S. 885; cf. *Strong* v. *Repide*, 213 U.S. 419, 431; and *Diamond* v. *Oreamuno*, 24 N.Y. 2d 494, 301 N.Y.S. 2d. 78.

[42] The first opinion by the Commission under Rule 10b–5 was issued "to call attention" to the rule and to the Commission's view that it was a violation for insiders, without disclosing a

enforcement actions in the courts,[43] in *amicus curiae* briefs in private actions,[44] and in pamphlets describing its activities to the public and reports to Congress.[45]

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plan to liquidate the corporation at a large premium over the market price of the stock, to cause their corporation to purchase its stock from the minority public shareholders, thereby increasing the value of the insiders' holdings "almost to the same extent as if they had purchased such shares for themselves." *Ward LaFrance Truck Corp.*, 13 S.E.C. 373, 374, 376, 381; *accord*, *R. D. Bayley & Co.*, 19 S.E.C. 773, 784; *Hughes & Treat*, 22 S.E.C. 623, 626 (dictum); *Cady,Roberts & Co.*, 40 S.E.C. 907.

[43] *E.g.*, *Securities and Exchange Commission* v. *First Investment Co.* D.N.H. (Litigation Release No. 281, June 20, 1945); *Securities and Exchange Commission v. Boyd Transfer & Storage Co.* (D. Minn.) (Litigation Release No. 295, Aug. 20, 1945; Litigation Release No. 308, Dec. 7, 1945); *Securities and Exchange Commission* v. *Gentile* (S.D. N.Y.) (Litigation Release No. 323, Feb. 12, 1946); *Securities and Exchange Commission* v. *Redfield* (D. Mass.) (Litigation Release No. 899, Feb. 24, 1955); *Securities and Exchange Commission* v. *Aldred Investment Trust* (S.D. N.Y.) (Litigation Release No. 2081, Aug. 11, 1961). These actions were settled when the violators consented to injunctive relief and, in at least some cases, agreed to make restitution.

[44] *E.g.*, Memorandum of the Commission, *Amicus Curiae*, p. 3, Reply Memorandum of the Commission, *Amicus Curiae*, pp. 4–17, and the Supplemental Reply Memorandum of the Commission, pp. 7–16, in *Speed* v. *Transamerica Corp.*, *supra*, 99 F. Supp. 808.

[45] Securities and Exchange Commission, Work of the Securities and Exchange Commission 8 (1951, 1952, 1954 eds.), 9 (1957, 1960, 1961, 1962, 1964, 1965, 1966 eds.) (title varied in 1964 and 1965 eds.); Securities and Exchange Commission, Thirteenth Annual Report 63–64 (1947), Fifteenth Annual Report 72 (1949); see also "Study of Securities and Exchange Commission," *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. 723–726 (1952).

Petitioners do not appear to contend that the corporate employees in question here are not "insiders" as that term has been used in the context of Section 10(b),[46] or that a corporate official, who cannot himself purchase stock without disclosure, may give tips on the basis of the same material information to friends, relatives and business associates so that they can use the information in securities transactions without disclosure.[47] They argue (TG Pet. 33), however, that "[t]he legislative history clearly demonstrates that, absent a showing of fraud or deceit,

[46] The trial court's holding that "insiders subject to the disclosure requirements of Section 10(b) and Rule 10b–5 may include employees as well as officers, directors, and controlling stockholders who are in possession of material undisclosed information obtained in the course of their employment" (Pet. App. 23a) was unanimously upheld by the court of appeals (Pet. App. 85a–86a, 119a, 128a, 170a). Accord, *e.g.*, *Ross* v. *Licht*, 263 F. Supp. 395 (S.D.N.Y.); 3 Loss, *Securities Regulation* 1450–1454 (2d ed. 1961); Fleischer, *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding*, 51 Va. L. Rev. 1271, 1280–1282 (1965).

[47] Petitioner Darke, who was found to have violated Section 10(b) and Rule 10b–5 for tipping, does not appear to contend that such a tip would be lawful if given with knowledge that the information was not available to the investing public. See *Kuehnert* v. *Texstar Corp.*, 412 F. 2d 700 (C.A. 5); *Wohl* v. *Blair & Co.*, 50 F.R.D. 89 (S.D.N.Y.); *Ferraioli* v. *Cantor*, 281 F. Supp. 354 (S.D.N.Y.); *Ross* v. *Licht*, 263 F. Supp. 395 (S.D.N.Y); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CCH Fed. Sec. L. Rep. ¶77,629 (S.E.C.); cf. *Investors Management Co., Inc.*, CCH Fed. Sec. L. Rep. ¶78,163 (S.E.C.); *Blyth & Co.*, CCH Fed. Sec. L. Rep. ¶77,647 (S.E.C.); *Herbert L. Honohan* 13 S.E.C. 754, 757–758, modified in other respects, 16 S.E.C. 297; 3 Loss, *Securities Regulation*, *supra*, 1450–1451. See also, *Mosser* v. *Darrow*, 341 U.S. 267, 271–272.

Section 16(b) was designed to be the sole prohibition against insider trading." Section 16(b) provides that a corporation may recover profits realized in short-swing transactions by directors, officers and large stockholders of the corporation regardless of whether they have traded on inside information. As the district court noted at length, there are significant differences between Section 10(b) and Section 16(b) and the provisions of the latter impose no limitation on the former (Pet. App. 20a–26a). Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 91; *Securities and Exchange Commission* v. *National Securities Inc., supra,* 393 U.S. at 465–466. Furthermore, the fact that Congress deleted from an early draft of what became Section 16(b) certain other provisions relating to insider trading does not indicate any lack of concern for the abuse in question here.[48]

[48] The original bills introduced in Congress not only provided for the recovery of profits from short-swing transactions but also outlawed purchases made with intent to engage in short-swing transactions as well as tips of inside information and provided for the recovery by the corporation of profits from tips. H.R. 7852, S. 2693, § 15(b), 73d Cong., 2d Sess. (1934). At the hearings it was indicated that as written these provisions involved difficult problems of interpretation and proof. *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 7852 and 8720*, 73d Cong., 2d Sess. 133–138 (1934); *Hearings Before the Senate Committee on Banking and Currency on S. Res. 84 (72d Con.) and S. Res. 56 and 97 (73 Cong.)* 73d Cong., 1st and 2d Sess. 6556–6561, 6954–6955 (1934); *Blau* v. *Lehman*, 368 U.S. 403, 412 n.12; *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 236 (C.A. 2), certiorari denied, 320 U.S. 751. Thus, the subsequent versions of the bills reported out in both houses omitted these provisions,

As the court of appeals noted (Pet. App. 86a n. 9), the legislative history indicates that "Congress intended by the Exchange Act to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office." Indeed, the Senate Report stated: "Among the most vicious practices unearthed * * * [in the legislative hearings] was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities."[49] This legislative history indicates that the power delegated to the Commission in Section 10(b) to define "any manipulative or deceptive device or contrivance" includes the power to prohibit a wide range of abuses in the area of insider trading.

Petitioners imply (TG Pet. 34) that the use of inside information for trading activities should not be unlawful if those activities are carried out in an anonymous exchange market. Such a limitation, as the Second Circuit has previously indicated, "would be

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and the House version even omitted what is now Section 16(b). H.R. 9323, § 15, S. 3420, § 16, 73d Cong., 2d Sess. (1934); the Senate version of what is now Section 16 was accepted in conference, H.R. Rep. No. 1838, 73d Cong., 2d Sess. 35–36 (1934), and enacted, apparently on the premise that the imposition of liability without any showing of abuse of inside information went beyond even the broad rulemaking powers given to the Commission.

[49] S. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934). This language is contained in the section of the report dealing with "Market Activities of Directors, Officers, and Principal Stockholders of Corporations."

contrary to the intent of Congress, as set forth in Section 2 of the Securities Exchange Act, 15 US.C. § 78b, which was to regulate 'transactions in securities as commonly conducted upon securities exchanges [as well as] over-the-counter markets.'" *List* v. *Fashion Park, Inc., supra,* 340 F. 2d at 462.[50] Indeed, disclosure is perhaps most important in impersonal transactions, such as those carried out on a stock exchange, because the stockholder who deals with an insider on a face-to-face basis has an opportunity to make informal inquiry whether the insider is in possession of any material information not available to the public.[51] As the court of appeals pointed out, abuse of inside information allows insiders to obtain "secret corporate compensation * * * at the expense of the uninformed investing public * * *. Such inequities based upon unequal access to knowledge should not be shrugged off as inevitable in our way of life, or, in

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[50] The *List* opinion also answered petitioners' contention that purchases of stock on a national securities exchange on the basis of material inside information do not induce other investors to sell their stock at that time (TG Pet. 34–35), pointing out that the concept of reliance is not limited to a situation in which the investor

> actively relied on the silence of the defendant, either because he consciously had in mind the negative of the fact concealed, or perhaps because he deliberately put his trust in the advice of the defendant. * * * The proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact. * * *

340 F. 2d at 463. Accord, *Myzel* v. *Fields, supra,* 386 F. 2d at 735.

[51] Cf. *Broffe* v. *Horton,* 172 F. 2d 489, 494 (C.A. 2).

view of the congressional concern in this area, remain uncorrected" (Pet. App. 92a–93a).

6. With respect to the question of remedy, petitioners contend that in a suit brought by the Commission, the district court could grant no more than an injunction and that it was without power to order restitution and other relief (HDC Pet. 12–20; TG Pet. 40–41). This Court has held, however, that the grant of jurisdiction in Section 27 of the Securities Exchange Act permits the courts to grant appropriate remedies to effectuate the purposes of the Act and to deter future violations thereof. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433–435; accord, *Deckert* v. *Independence Corp.*, 311 U.S. 282; cf. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. In other contexts the Court has upheld the power of the government to seek, and the courts to grant, restitution as an ancillary remedy in spite of the absence in the statutory language of "affirmative confirmation of the power to order reimbursement." *Mitchell* v. *DeMario Jewelry*, 361 U.S. 288, 291–292; accord, *Porter* v. *Warner Holding Co.*, 328 U.S. 395; see also *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 and n. 13. In fact, the court may grant restitution even though injunctive relief is neither sought nor granted. See *United States* v. *Moore*, 340 U.S. 616, 620, n. 6.[32]

[32] Section 21(e) of the Act, which refers only to injunctive relief, does not limit the Commission's authority to invoke the courts' general equity powers to afford complete relief. See *e.g.*, *Lankenau* v. *Coggeshall & Hicks*, 350 F. 2d 61 (C.A.

"An order of restitution is not a judgment for damages or for penalties. It compels compliance and is restorat[ive] of the status quo which falls within the recognized power of a court of equity." *Bowles* v. *Skoggs,* 151 F. 2d 817, 821 (C.A. 6); accord, *e.g., Mitchell* v. *DeMario Jewelry, supra,* 361 U.S. at 293; *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110, 128. Petitioners here were "merely deprive[d] * * * of the gains of their wrongful conduct" (Pet. App. 228a–229a).[53] *Ibid.* Indeed, the formula employed by the court permitted petitioners to retain profits accruing after April 17, 1964 (the day following the announcement that Texas Gulf had a "major strike"). With respect to Mr. Darke, who was held liable for the profits of his tippees, the court recognized that "more of a hardship is imposed" on

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2); *Los Angeles Trust Deed & Mortgage Exchange* v. *Securities and Exchange Commission,* 285 F. 2d 162, 181–182 (C.A. 9), certiorari denied, 366 U.S. 919; see generally J. W. Wade and R. D. Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency,* 37 Geo. Wash. L. Rev. 1031, 1048–1056 (1969). Indeed, the Commission has obtained restitution or rescission in other cases. See, *e.g., Securities and Exchange Commission* v. *Golconda Mining Co.,* CCH. Fed. Sec. L. Rep. ¶93,058 (S.D. N.Y.); *Securities and Exchange Commission* v. *Wong.* 252 F. Supp. 608, 613–614 (D.P.R.). This is consistent with *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.,* 320 U.S. 344, 350–351, where this Court declined to invoke the concept of *expressio unius est exclusio alterius* to limit the scope of securities legislation.

[53] The court of appeals rejected petitioners' contentions that a penalty was involved because under the judgment Texas Gulf might retain the fund even though it was not damaged

him,[54] but "without such a remedy, insiders could easily evade their duty to refrain from trading on the basis of inside information"[55] since the transaction "could be concluded by a relative or an acquaintance * * * or implied understandings could arise under which reciprocal tips between insiders in different corporations could be given" (Pet. App. 229a). Cf. *Mosser* v. *Darrow*, 341 U.S. 267, 271–272.[56]

7. Finally petitioners make a number of constitutional and procedural arguments which we submit are without merit. Texas Gulf contends that the court of appeals' determination that the issuance of a false press release may violate Section 10(b) of the Securities Exchange Act contravenes the First Amendment (TG Pet. 27–30). In *Donaldson* v. *Read Magazine,*

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by this breach of fiduciary duty (Pet. App. 229a–230a). "[T]he primary concern, in a case such as this, is not to determine whether the corporation has been damaged but to decide, as between the corporation and the defendants, who has a higher claim to the proceeds derived from the exploitation of the information." *Diamond* v. *Oreamunó*, *supra*, 24 N.Y. 2d at 498, 499, 301 N.Y.S. 2d at 81–82. Nevertheless, the corporation, which has "a great interest in maintaining a reputation of integrity, an image of probity, for its management and in ensuring the continued public acceptance and marketability of its stock," is injured by their conduct. *Ibid.*

[54] The district court did not charge Mr. Darke with the profits of his tippees' tippees and the Commission did not appeal from that ruling (Pet. App. 206a–207a).

[55] Section 20(b) of the Act, 15 U.S.C. 78t(b), specifically makes it "unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under * * * [the Act] through or by means of any other person."

[56] The district court did not abuse its discretion in enjoining Messrs. Crawford and Clayton since, as the court of appeals noted, there was "sufficient distinction in [their] cases for the district court to single them out" (Pet. App. 225a).

*Inc.*, 333 U.S. 178, 190, however, this Court stated that the "governmental power" utilized in the Securities Exchange Act and other specified antifraud statutes in making false statements unlawful "has always been recognized in this country and is firmly established." *Donaldson* upheld the validity of an order depriving respondents "of a right to speak or print * * * to the extent necessary to protect others from * * * fraudulent artifices." 333 U.S. at 191. While a tolerance for negligence by conduits of information and topical views (such as newspapers and pamphleteers) may be necessary to assure a free flow of ideas,[57] the protection of the investing public from material misstatements by corporate officials affecting the market value of the corporation's publicly-traded stock clearly outweighs any "right" of these officials to make public statements without exercising due diligence in determining their accuracy.[58] Accordingly,

[57] See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278–279; *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29.

[58] Some courts have questioned whether commercial speech, such as that involved here, involves issues "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period," *Thornhill* v. *Alabama*, 310 U.S. 88, 102, as Texas Gulf asserts (TG Pet. 29). See, *e.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52; *New York State Broadcasters Assoc.* v. *United States*, 414 F. 2d 990, 996–997 (C.A. 2), certiorari denied, 396 U.S. 1061 *Banzhaf* v. *Federal Communications Commission*, 405 F. 2d 1082, 1101–1102 (C.A. D.C.), certiorari denied *sub nom. Tobacco Institute* v. *Federal Communications Commission*, 396 U.S. 842; cf. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150; *Breard* v. *City of Alexandria*, 341 U.S. 622, 642; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Martin* v. *City of Struthers*, 319 U.S. 141, 142 n.1.

the court below correctly held (Pet. App. 224a-225a) that, in balancing unfettered corporate or commercial speech against injury to the public resulting from misleading or fraudulent corporate press releases, such commercial speech is not entitled to constitutional immunity. *Securities and Exchange Commission* v. *Wall Street Transcript Corp.*, 422 F. 2d 1371, 1379–1380 (C.A. 2), certiorari denied, 398 U.S. 958. See also, *United States* v. *Amick*, 439 F. 2d 351, (C.A. 7), certiorari denied, No. 70–134, Oct. 12, 1971; *Securities and Exchange Commission* v. *May*, 229 F. 2d 123 (C.A. 2); *Halsted* v. *Securities and Exchange Commission*, 182 F. 2d 660, 668 (C.A.D.C.).

Petitioners argue that in contravention of "the Fifth Amendment and well-settled principles of administrative procedure" (TG Pet. 38; H Pet. 18; HDC Pet. 23; C Pet. 26–27), Rule 10b–5 afforded them insufficient warning of the conduct it proscribes. But, as we have pointed out (pp. 36–37, *supra*), the prior consistent administrative and judicial interpretations of that rule furnished petitioners with ample notice that the rule proscribed the activities they engaged in. Cf. *Jordan* v. *DeGeorge*, 341 U.S. 223, 231–232. Where deceptive activity is involved, this Court has warned that "to define strictly the species or evidences of it," would result in jurisdiction over such activity being "perpetually eluded by new schemes which the fertility of man's invention would contrive." [59] Moreover,

[59] *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, *supra*, 375 U.S. at 193 n. 41, quoting from letter of Lord Hardwicke to Lord Kames, dated June 30, 1759.

this Court has recognized that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203.[60]

Petitioners also argue (C Pet. 12; TG Pet. 41; H Pet. 19) that they were entitled to oral argument after the lower court determined to decide the case *en banc*. On May 2, 1968, three months prior to its decision in this case, the court of appeals advised the parties that "* * * the appeal [would] be considered in banc by all the active judges of the Court upon the record and the briefs [t]heretofore filed, and the opinions written by the judges who heard the argument of the appeal, without further argument" (C.A. 2, Docket No. 30882). No motion for leave to present additional oral argument was made by any of the parties at that time. Thus even if petitioners had a right to be heard orally by the full panel of court below, it would appear that they waived this right. In any event, no such "right" (C. Pet. 19) is an element of due process. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275. Nor does Section 46(c) of Title 28 of the United States Code or the Federal Rules of Appellate Procedure, upon which petitioners rely (C.

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[60] Cf. *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 771–772 (opinion of Mr. Justice Black); *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421. As this Court made clear in *Chenery*, *supra*, the fact that proceeding by litigation "might have a retroactive effect" is "not necessarily fatal to its validity." 332 U.S. at 203.

Pet. 12–22), provide that parties have a "right" to oral argument before the full court. This Court has repeatedly stated that:

> § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. * * * [61]

While Rule 34 of the Federal Rules of Appellate Procedure provides for oral argument, Rule 2 authorizes a court of appeals to "suspend the requirements or provisions of any of these rules in a particular case * * * on its own motion and [to] order proceedings in accordance with its direction."

Petitioner Crawford also urges (C Pet. 30–32) that the use of the words "material" and "disclosed" in the permanent injunction entered against him are unconstitutionally "vague" and "subjective." In support of this contention he points to purported differences between the court of appeals and the district court in deciding what was material in this case. There was no such difference, however, with respect to the activities of Mr. Crawford, who knew that the April 16 press release that was about to be issued contained material information which had not been disclosed publicly when he made his purchases of

[61] *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, 250. This language was quoted in *Shenker* v. *Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 4–5, where it was held that a court of appeals' rule limiting *en banc* consideration only where voted by *each* of the active circuit judges would be sustained despite the language in the statute to the effect that "a hearing or rehearing before the court in banc * * *" might be "ordered by a majority of the [active] circuit judges * * *."

Texas Gulf shares (see pages 13–14, *supra*). By virtue of the *en banc* opinion of the court of appeals, Mr. Crawford has at least as much guidance as to the appropriate meaning of the word "material" as he would have with respect to the application of that word in federal criminal statutes dealing with perjury and false filings. See 18 U.S.C. 1621 and 1001.

The additional constitutional arguments raised by various of the individual petitioners (HDC Pet. 22–23) are based on the assumption that the relief granted by the district court constituted a penalty. As we have seen, pages 43–44, *supra,* this is not so.

## CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1971.

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# PETITION FOR REHEARING

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E. ROBERT SEAVER, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

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Docket No. ~~328~~ 71-328

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EARL L. HUNTINGTON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

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# PETITION FOR REHEARING

Earl L. Huntington, pro se
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New York, New York 10017

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

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Docket No. 328

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EARL L. HUNTINGTON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

## PETITION FOR REHEARING

Petitioner respectfully moves the Court for an order vacating the denial of his petition for a writ of certiorari (entered December 20, 1971) and also granting the requested writ. In so moving, petitioner joins with Texas Gulf Sulphur Company et al., in Docket Nos. 327, 346

and 347. All applicable points made in petitions for rehearing filed by the other petitioners are adopted by reference.

The end appears close at hand. The chances of success in any petition for rehearing must be extremely small. And yet the effort is made. Why? Because of the belief that a wrong has been done and that the Supreme Court may right it.

At this point, an observation made by petitioner in 1965 appears to have been most prophetic and may be worth repeating. Petitioner observed in essence that our greatest problem in this highly publicized case might well be a subconscious reaction on the part of the judges involved to ascend to the pulpit and preach morality and that the facts, law and procedure might be bent accordingly.

It appears that the fears were real. Rough-shod treatment was given to the facts by the majority of the Court

of Appeals. The law was bent beyond former recognition. An ad hoc standard of materiality was coined, lower than the standard of materiality applicable in all other areas of securities law. The same with procedural rules. Rule 52(a) was dismissed as not applicable by the Court of Appeals in clear conflict with the decisions of this Court. A proceeding en banc at which oral argument was not permitted was held long after the hearing before the original three-judge panel.

Petitioner felt there was an excellent chance for reversal of the decision by the Court of Appeals if only this Court would take the case. It was most disappointing when not even one dissent was registered to the decision denying certiorari. This is indeed hard to understand since, at the very least, the materiality issue, along with the issue involving the proper scope of ap-

pellate review, cries out for decision.

Reference is made to Reliance Electric Co. v. Emerson Electric Co., 40 LW 4125 (decided January 11, 1972), a Section 16(b) case under the 1934 Act, where the majority of the Court said to the SE[redacted]hat if you want the statute changed go to Congress. The same approach, telling the SEC to resort to Congress or formal rule making procedures if it wants the law changed, should be followed in this case, rather than stretching Rule 10b-5 beyond the fair meaning of its language.

Surely the Texas Gulf case, with all its notoriety and precedent making importance warrants review as much or more than Reliance Electric or many other securities cases the Court has decided. Paraphrasing a recent speech by Judge Irving Kaufman, the Texas Gulf case has become the Hadley v. Baxendale of securi-

ties law and has been cited in every Rule 10b-5 case since heard by the Court of Appeals for the Second Circuit - usually by both sides. 26 Record of N.Y. C.B.A. 657, 659.

Petitioner urges the Court to reconsider. Permit Justices Rehnquist and Powell to participate. The case is worthy of your consideration.

Respectfully submitted,

Earl L. Huntington
Pro se

Dated: January 14, 1972

CERTIFICATE OF GOOD FAITH

I hereby certify that the petition for rehearing is presented in good faith and not for delay and is substantially restricted to the grounds specified in Rule 58(2).

Petitioner - Pro Se